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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

J.A., a Minor, etc., Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.	B208833 (Los Angeles County Super. Ct. No. BC375217)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Luis A. Carrillo and John Henrichs for Plaintiff and Appellant.

Fagen Friedman & Fulfrost, Howard A. Friedman and Maggy M. Athanasious for Defendants and Respondents Los Angeles Unified School District, Marguerite Poindexter Lamotte, Monica Garcia, Marlene Canter, Julie Korenstein, Jefferson Crain, and Joe Nardulli.

I. INTRODUCTION

Plaintiff, J.A., a minor, by and through his guardian at litem, Cecilia Cruz, appeals from a judgment dismissing his second amended complaint for damages for a violation of Education Code section 49076 and negligence against defendants, Los Angeles Unified School District (the school district), Marguerite Poindexter LaMotte, Monica Garica, Marlene Canter, Julie Korenstein, Jefferson Crain and Joe Nardulli. The second amended complaint was dismissed pursuant to defendants' Code of Civil Procedure[1] section 425.16 special motion to strike. All of the claims in the second amended complaint arise out of defendants' petitioning related activity and their conduct is absolutely privileged under Civil Code section 47, subdivision (b)(2). Accordingly, we affirm the judgment.

II. BACKGROUND

The second amended complaint alleges claims for violation of Education Code section 49076 (first), negligence (second), and respondeat superior (third). The second amended complaint alleges defendants are employees, agents, and servants of the school district. It was alleged: the school district released information from the minor's confidential pupil records; the pupil records were released to the school district's attorneys; the school district attorneys released the information to attorneys representing the City of Los Angeles City (the city); the records were utilized at a deposition; and the records were offered as evidence in a federal lawsuit over the minor's objections.

The second amended complaint specifically alleged: "The disclosure of the confidential 'Pupil Record' was also an invasion into J.A.'s privacy because the confidential records contained private facts and outrageous, unproven, hearsay allegations of a sensitive nature. The confidential 'Pupil Record' also included

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

outrageous, false allegations against J.A. by his school teacher. These comments concerned intimate details of a child's life and were not a legitimate matter of public concern. Defendants released the confidential records of J.A. containing these outrageous, unproven, hearsay allegations of a sensitive nature to persons that were unauthorized to see them to know their contents, such as attorneys [from the City Attorney's office]. The Defendants disclosed the confidential 'Pupil records' containing these outrageous, unproven, hearsay allegations of a sensitive nature in a careless and negligent manner. The information in these highly sensitive records has now been seen by various individuals, and published to the public in a public courtroom, in a manner that would humiliate an average individual, and specially an [eight-year-old] child such as J.A. [¶] . . . Further, the release of information in these confidential records to nonschool district employees and to public persons through the deposition process has caused J.A. to experience severe emotional trauma."

On March 11, 2008, defendants filed a special motion to strike the second amended complaint. Defendants argued the conduct alleged in the second amended complaint arose out of their acts in furtherance of their petition and free speech rights under the federal and state constitutions in connection with an issue of public interest. Defendants also argued plaintiff could not establish a probability of success on any of the claims asserted in the second amended complaint. The evidence offered in support of the special motion to strike established the following. Ms. LaMotte, Ms. Garcia, Ms. Canter, and Ms. Korenstein are members of the school district's trustee board. Mr. Crain is the board's executive officer and Mr. Nardulli is a school principal.

Defendants also requested judicial notice of a federal complaint and judgment filed in September 2005 in the United States District Court for the Central District of California. The federal lawsuit was brought against Mr. Nardulli, the city, and Chief of Police William Bratton. The federal complaint alleged that the minor had been arrested in August 2005 when he was seven years old. The arrest occurred after Mr. Nardulli called the police after an incident that occurred at school. It was undisputed the

documents were used and disseminated in connection with the federal action. As a result, defendants argued plaintiff could not demonstrate a probability of success on the merits.

Defendants further argued that plaintiff was collaterally estopped from litigating issues raised by the second amended complaint by an October 31, 2007 dismissal of the school district's attorneys from the current action pursuant to section 425.16. On October 21, 2008, in an unpublished opinion, we affirmed the trial court's order dismissing the first amended complaint against the school district's attorneys in response to a section 425.16 special motion to strike. (*J.A. v. Guiterrez, Preciado & House ,LLP* (Oct. 21, 2008, B204793) [nonpub. opn.].) We concluded: "The parties have discussed at length issues concerning the privacy of the minor's school records which were disclosed to defendants by a codefendant, the Los Angeles Unified School District (the district), in an underlying federal lawsuit filed … against [the city, Chief Bratton, and Mr. Nardulli]. We need not address the parties discussion concerning Education Code section 49076 as plaintiff's claims arise out of petitioning related activity and all of defendants conduct is subject to the Civil Code section 47, subdivision (b)(2) absolute litigation privilege." (*J.A. v. Guiterrez, Preciado & House, LLP, supra,* at p. 2.)

In opposition to the current special motion to strike, plaintiff argued: the pupil records were released by Mr. Nardulli to the school district's counsel and the city attorney's office as part of a conspiracy; obtaining the records was an invasion into the minor's privacy rights; the records contained private facts and outrageous, unproven, and hearsay allegations of a sensitive nature which were not a legitimate matter of public concern; and defendants gave the records to unauthorized persons or utilized the records in a careless and negligent manner. According to plaintiff, the section 425.156 motion was inapplicable because the records were prepared well before the parties engaged in litigation. Plaintiff asserted: the gravamen of the second amended complaint is that defendants obtained his pupil records in violation of Education Code section 49076 which enumerates the only legal means to obtain the documents; Education Code section 49076 created a duty to refrain from obtaining the records except as specified in the statute and none of conditions occurred in this case; and he was likely to prevail on the

merits because defendants did not dispute they had violated Education Code section 49076 and the litigation privilege was inapplicable.

In the opposition, plaintiff's counsel, Luis Carillo, declared that questions of a sensitive nature were posed to plaintiff at a deposition in August 2006. In November 2006, Mr. Carillo learned that the pupil records were being circulated by the law firms while Ms. Cruz, the minor's mother was being deposed. The documents were introduced at the mother's deposition, without her consent, and over Mr. Carillo's objections. The city listed portions of the records as exhibits in the federal trial. An attorney representing the city attempted to introduce the documents in front of the jury in the federal action.

In reply, defendants argued that the action was appropriate for a section 425.16 motion because their conduct was in furtherance of their petition and free speech rights. Defendants further asserted: their conduct was protected by the litigation privilege so that plaintiffs could not establish a probability of success on the merits; there was no private right of action for damages under Education Code section 49076; there is no individual liability for an Education Code section 49076 violation; and plaintiff was collaterally estopped from proceeding against defendants by the trial court's October 31, 2007 ruling in favor of the school district's attorneys.

On April 8, 2008, the trial court granted defendants' special motion to strike the second amended complaint. The trial court's tentative decision states: defendants' challenged conduct arose from actions taken in the federal lawsuit; plaintiff could not establish a probability of success because defendants had the right to defend themselves in the federal action; and the propriety of obtaining or disseminating the records under Education section 49076 had been raised by a motion in limine in the federal action. The trial court ruled, "The actions of the defendants were authorized by the Federal Action to use the records and the [trial court] will not revisit the issue in state court." On May 21, 2008, judgment on the second amended complaint was entered in favor of the school district defendants. On June 19, 2008, plaintiff appealed from judgment dismissing the second amended complaint.

III. DISCUSSION

A. Inadequate Record

Plaintiff's failure to designate a reporter's transcript warrants affirmance based on the inadequacy of the record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *In re Kathy P*. (1979) 25 Cal.3d 91, 102.) In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles, supra,* 43 Cal.3d at pp. 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P., supra*, 25 Cal.3d at p. 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].) On this ground alone, the judgment must be affirmed.

B. Special Motion to Strike Standards

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the courts finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783.) When a special motion to strike is filed, the trial court must consider two components. First, the moving party has the initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Section 425.16 does not apply to every claim which may have some tangential relationship to free expression or petition rights. The Supreme Court has held: "[Section 425.16] cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights.' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77, quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002, orig. italics.)

Second, once the defendant establishes the operative complaint's claims arise out of the exercise of petition or free expression rights, the burden shifts to plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 314; *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.) The Supreme Court has defined the probability of prevailing burden as follows: "'[T]he plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of the facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited."' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, quoting *Matson v. Dvorak*

(1995) 40 Cal.App.4th 539, 548.)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) In reviewing the trial court's order granting the motion, we use our independent judgment to determine whether the defendants were engaged in a protected activity (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 325-326; *Rushen v. Cohen*, *supra*, 37 Cal.4th at p. 1055) and plaintiff met his burden of establishing a probability of prevailing on the claim. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

C. Defendants' Burden

Defendants met their initial burden of showing the allegations of the second amended complaint arose out of the exercise of their petition rights. The operative pleading alleged that the defendants improperly disclosed the minor's student records to their attorneys. The records were ultimately disseminated to and utilized by co-defendants' counsel in the federal action. Defendants' actions arose from the exercise of a petitioning activity. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [communications preparatory to or in anticipation of litigation subject to § 425.16]; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 907-908 [acts or statements made by attorney in lawsuit subject to protection under § 425.16]; *Dowling v. Zimmerman, supra,* 85 Cal.App.4th at p. 1420 [initial burden established by showing conduct involved a stipulated settlement and writing on client's behalf in connection with pending litigation]; see also *Flatley v. Mauro, supra,* 39 Cal.4th at p. 322, fn. 11 [pre-litigation communication or conduct preparatory or in anticipation of an action or other official proceeding protected by section 425.16].) The sole allegations of the second amended complaint involve actions in connection with the preparation for and litigation of a defense against plaintiff's federal action. The gravamen of the second amended

complaint is that the records were obtained and disclosed as part of a defense to the federal action.

D. Plaintiff's Burden

Plaintiff claims that the disclosure of his records to the law firm and ultimately to the city attorney's office breached the confidentiality of his pupil records under Education Code section 49076 and invaded his constitutional privacy right. However, because the documents were produced in the litigation context, the production is subject to the litigation privilege in Civil Code section 47, subdivision (b)(2). Our Supreme Court has held: "The privilege 'applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.' [Citations.] 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.]" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955; see also *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1057; see *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege extends to a specific communication even if it is meant to be kept confidential. (*Jacob B. v. County of Shasta*, *supra*, 40 Cal.4th at pp. 956-959 [absolute privilege of (Civ. Code, § 47, subd. (b) applied to a confidential letter]; see also *Ribas v. Clark* (1985) 38 Cal.3d 355, 364; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141.) The school records in this case were reviewed and utilized in response to a federal lawsuit. The communications were made by litigants and their agents to other litigants in the connection with the pending case. Even though the documents might otherwise be deemed confidential, the communications are subject to the privilege of Civil Code section 47, subdivision (b).

E. The Attorney Fee Award

Plaintiff also filed a notice of appeal from a July 11, 2008 order granting the school district defendants attorney in the amount of $11,385 and costs of $360. Plaintiff's opening and reply briefs are silent on the attorney fee and cost award. Thus, any attorney fee issue plaintiff could raise has been forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 70, disapproved on another point in *Bailey v. Los Angeles* (1956) 46 Cal.2d 132, 139.) Defendants have requested attorney fees for defending this appeal. Because the special motion to strike was properly granted, defendants are entitled to their attorney fees and costs, including those incurred in this appeal. (§ 425.16, subd. (c); *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643; *Wanland v. Law Offices of Mastagni, Holstedt, & Chiurazzi* (2006) 141 Cal.App.4th 15, 20-24.)

IV. DISPOSITION

The judgment is affirmed. Defendants, Los Angeles Unified School District, Marguerite Poindexter LaMotte, Monica Garcia, Marlene Canter, Julie Korenstein, Jefferson Crain, and Joe Nardulli, shall recover their costs and attorney fees from plaintiff, J.A., a minor, by and through his guardian ad litem, Cecilia Cruz.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.